

**BEFORE THE  
NATURAL RESOURCES COMMISSION  
OF THE  
STATE OF INDIANA**

<b>IN THE MATTER OF:</b>	)	<b>Administrative Cause</b>
	)	<b>Number: 14-006W</b>
<b>READOPTION OF 312 IAC 10:</b>	)	
<b>FLOOD PLAIN MANAGEMENT</b>	)	<b>(LSA Document #14-65(F))</b>

**RECOMMENDATION FOR FINAL ACTION ON READOPTION OF RULE**

**A. INTRODUCTION**

For consideration is the readoption of 312 IAC 10 in its entirety, and without amendment. This article establishes minimum standards for the delineation and regulation of flood plains to decrease existing flood damages, mitigate future flood damages, and promote the health, safety, and welfare of the people of Indiana. This article assists with the implementation of IC 14-28-1 (Flood Control Act), IC 14-28-3, and IC 14-29-1 (Navigable Waterways Act). 312 IAC 10 can be accessed through the Indiana General Assembly's website at: <http://www.in.gov/legislative/iac/T03120/A00100.PDF>.

If rules are readopted in their current form without amendments under 312 IAC 2-2-4(b), the Director of the Division of Hearings may approve preliminary action. The Commission retained authority to take final action on readoptions.

The Director of the Division of Hearings approved preliminary action on February 26, 2014. The standard practice is to readopt rules by article, and 312 IAC 10 is now submitted for consideration as to final action.

**B. READOPTION ANALYSIS REQUIRED UNDER IC 4-22-2.5-3.1 AND IC 4-22-2.1-5**

George Bowman, Assistant Director of the Division of Water, was appointed Small Business Regulatory Coordinator for the rule readoption. He provided the following analyses of potential impacts to small business for the proposed readoption of 312 IAC 10:

Review under IC 4-22-2.5-3.1**Purpose**

The purpose of this memorandum is to provide the analysis anticipated by IC 4-22 with respect to the readoption of 312 IAC 10. 312 IAC 10 consists of rules 1 through 5.

**Rule 1: Application**

This rule outlines the purpose and scope of Floodplain Management rules with respect to the authorities and directives outlined in IC 14-28-1 and IC 14-28-3. This rule sets forth the mechanism to establish minimum standards for the delineation and regulation of flood plains to decrease existing flood damages, mitigate future flood damages, and promote the health, safety, and welfare of the people of Indiana. These minimum standards are written with an understanding of the legislative declaration that the loss of lives and property caused by floods and the damage resulting from floods is a matter of deep concern to Indiana affecting the life, health, and convenience of the people and the protection of property. Floodways should not be inhabited and should be kept free and clear of interference or obstructions that will cause any undue restriction of the capacity of floodways. The water resources of Indiana that have been diminished should be accumulated, preserved, and protected to prevent any loss or waste beyond reasonable and necessary use. IC 14-28-3 and this rule also establish that a county or municipality must not authorize a structure, obstruction, deposit, or excavation within a floodway without the applicant first receiving a license from the Department under IC 14-28-1. The rule does not impose any requirements or costs on regulated entities under IC 4-22-2-24(d)(3).

**Rule 2: Definitions**

This rule provides definitions with applicability to IC 14-28-1, IC 14-28-3, and 312 IAC 10. The rule does not impose any requirements or costs on regulated entities under IC 4-22-2-24(d)(3).

**Rule 3: Flood Plain Delineations and Management**

This rule establishes that a flood plain, floodway and fringe exist for each waterway even if an area is not delineated on a map and that a county or municipality that administers IC 14-28-3 must adopt an ordinance to implement this rule within the flood plain, floodway and fringe. Flood plains (or floodways and fringes) that have been designated by the Federal Emergency Management Agency for a flood insurance study under 44 CFR 60.3 shall be used for regulatory purposes. In the absence of a Federal Emergency Management Agency designation, the department or another person subject to the review and approval of the Department may delineate flood plains and floodways subject to requirements set forth in the rule. This rule also establishes procedures for when the Natural Resources Commission may designate a floodway.

The rule also establishes minimum criteria for the construction of a building with a floor area greater than 400 square feet in a flood plain, defines role and responsibility of local government authorities to issue a local license for a structure, an obstruction, a deposit, or an excavation within a floodway or flood plain, authorizes a temporary license for recreational vehicles in a floodway or flood plain subject to certain conditions, and establishes criteria for non-conforming uses in the flood plain.

This rule imposes cost on small businesses that undertake construction, excavation, or fill activities within the floodway and floodplain area. The costs incurred on regulated entities under IC 4-22-2-24(d)(3) are those necessary to comply with minimum federal and state requirements to minimize damage to property by means of floodwaters.

**Rule 4: Floodway Licensing**

This rule establishes that a license from the Department is required to erect, make, use, maintain, suffer, or permit a structure, obstruction, deposit, or excavation in or on a floodway. Development and maintenance of crops, pastures, forests, and parks and recreational use are exempted from licensing requirements unless the activities involve the placement of a structure, obstruction, deposit, or excavation.

The rule also establishes the criteria for constructing additions to lawful abodes in the floodway provided the addition does not increase the market value by more than fifty (50%) percent of the

market value of the original structure when it was originally constructed. It also sets forth the requirements for the completion of an appraisal for use in the building's market value determination.

Additionally, this rule sets forth criteria regarding the application of flood easements. Costs to small businesses and other regulated entities for the preparation of a certificate of approval are those resulting from IC 14-28-1. The timing requirements apply to small businesses and other regulated entities, as well as the Division, and they are justified for the orderly and considered dispositions of applications for certificates of approval. The rule does not impose any requirements or costs on regulated entities under IC 4-22-2-24(d)(3).

**Rule 5: General Licenses and Specific Exemptions from Floodway Licensing**

This rule sets forth the eligibility requirements for a general license for the following project types: Wetland Restoration Measures; Utility Line Crossings; Aerial Electric, Telephone, or Cable Television Lines; Removal of Logjams from a Waterway; Qualified Logjam and Sandbar Removals from beneath Bridges, Qualified Outfall Projects, Creek Rock Removal from Nonnavigable Waterways, and Prospecting in Nonnavigable Waterways. General and specific criteria are provided for each of the project types. Depending on the project type the general license may require notification to the Department. In those instances where written notification to the Department is required, the Department must respond to the request for a general license within ten (10) business days or else the general license is deemed to be valid by default.

The rule serves to lessen the costs on regulated entities under IC 4-22-2-24(d)(3) whose activities are regulated under IC 14-28-1 in two ways. The most measurable savings occurs when a small business activity qualifies for a general license. For an activity that qualifies for a general license the applicant does not have to pay the typical application fee of \$200 and the notification of adjacent landowners is not required therefore, the applicant saves on mailing costs associated with providing either certified mail or first class mail with return receipt to adjacent landowners as required under IC 14-11-4 and 312 IAC 2-3-3. Depending on project size and/or location, the savings could be substantial. Also, the level of plan preparation for submittal to the Department is greatly reduced; therefore, additional savings are realized in the preparation of project plans and drawings.

The second type of savings is a time savings associated with the cost of doing business. Activities subject to regulation under IC 14-28-1 that must undergo a formal permit review take approximately 90 to 120 days on average to process, while activities that may qualify for a general license must be processed in ten (10) business days. This time savings can be a benefit in reducing the overall costs of operating the small business.

**General Overview Concerning Comments and Complaints**

In addition to the rule specific descriptions provided above, the following general overview is provided.

**The continued need for the rule.**

The rule is necessary for the continued implementation of the regulatory programs administered by the Department and authorized under the statutory authority of IC 14-28-1 and IC 14-28-3. This rule is also necessary for the state to participate in the National Flood Insurance Program.

**The nature of any complaints or comments received from the public, including small businesses, concerning the rule or the rule's implementation by the agency.**

In most cases, the overall complaint regarding the rules is that more types of construction activities should be covered by a general license. Any rule that shortens the permit process is viewed favorably by the regulated community, including small businesses.

**The complexity of the rule, including any difficulties encountered by:**

**(a) the agency in administering the rule; or**

Any difficulties encountered through the course of administering the rule have been addressed by amending the rule when needed.

**(b) small businesses in complying with the rule.**

Because the rule has been around for a number of years, small businesses have learned to incorporate the permitting process into their planning and development. Compliance with the rule requirements is generally not an issue.

**The extent to which the rule overlaps, duplicates, or conflicts with other federal, state, or local laws, rules, regulations, or ordinances.**

In general the rule duplicates federal regulations contained in 44 CFR §§ 59 and 60 regarding floodplain management. This duplication is necessary for the state to participate in the National Flood Insurance Program.

**The length of time since the rule was last reviewed under this section or otherwise evaluated by the agency, and the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule since that time.**

The entire Rule 312 IAC 10 was last adopted in 2008. Since that time the rule has been amended 3 separate times. Rules 312 IAC 10-5-9 and 312 IAC 10-5-10 were adopted May 2009. Rule 312 IAC 10-5-11 was adopted November 2009. Rules 312 IAC 10-5-6 and 312 IAC 10-5-6.5 were adopted in October 2011. The rules were amended in 2009 and 2011 to address issues associated with administering general licenses for certain types of projects. Advancements in construction practices and the implementation of best management practices made these rule modifications reasonable and necessary to promote the preservation and protection of the natural resource while reducing business costs associated with obtaining a permit. Current economic conditions, advancements in technology and other factors have not changed in a way since the last amendment in 2011 to warrant rule modifications at this time.

Review under IC 4-22-2.1-5

**The degree to which the factors analyzed in a previous economic impact statement have changed since the statement was prepared**

Factors analyzed by the Department of Natural Resources for Rule 312 IAC 10 have not changed since the previous economic impact statement was prepared.

**Any regulatory alternatives included in the statement under IC 4-22-2.1-5(a)(5)**

No regulatory flexibility analysis of alternate methods was conducted by the Department of Natural Resources since there has been no change to the statutory requirements set forth under IC 14-28-1 and IC 14-28-3 since the previous economic impact statement was prepared.

**Any regulatory alternatives not considered by the agency at the time the statement was prepared could be implemented to replace one (1) or more of the rule's existing requirements**

No regulatory alternatives were considered by the Department of Natural Resources since there has been no change to the statutory requirements set forth under IC 14-28-1 and IC 14-28-3 since the previous economic impact statement was prepared.

Executive Order 13-03 required agencies to “suspend rulemaking action on any proposed rules for which a notice of intent to adopt a rule...was not submitted to the office of the *Indiana Register* on or before January 14, 2013.” Financial Management Circular 2013-01 restated these requirements and added compliance information. On May 2, 2013, the Director of the Office of Management and Budget wrote to inform agency heads the moratorium set forth in Executive Order 13-03 was not applicable to readoptions.

As specified by Executive Order 2-89 and Financial Management Circular 2010-4, fiscal analyses of the rule readoption proposal were submitted, along with a copy of the proposed rule language and a copy of the posted Notice of Intent to Readopt a Rule, to the Office of Management and Budget, the Legislative Council, and the Administrative Rule Oversight Committee on June 5, 2014. In a July 10, 2014 letter the Director of the State Budget Agency recommended the proposed rule readoption be approved.

**C. NOTICE OF INTENT TO READOPT AND RECOMMENDATION FOR FINAL ACTION**

On March 5, 2014, the “Notice of Intent to Readopt” 312 IAC 10 was posted to the *Indiana Register* at 20140305-IR-312140065RNA as anticipated by IC 4-22-2.5-2 and IC 4-22-2.5-4. The notice indicated the intention to readopt the entirety of 312 IAC 10 without changes. The notice also provided that a person had 30 days to submit a written request to the Commission, through the Small Business Regulatory Coordinator, seeking to have a particular section of the rule readopted separately. If a request had been made, the Commission would have been required to complete the full rule adoption process for the section requested to be readopted separately. No request was made.

The Commission may submit the rule for filing with the Publisher under IC 4-22-2-35 or elect the procedure for readoption under IC 4-22-2. The hearing officer recommends the Commission approve for readoption 312 IAC 10, without amendment, for subsequent filing with the Publisher.

Dated: July 29, 2014

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Jennifer M. Kane  
Hearing Officer